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the rule of absolute liability.¹⁸ It now seems well settled that the tenant has no remedy against the landlord in the absence of negligence.¹⁹

W. G. S.

WILLS—CONDITIONAL LIMITATIONS—RESTRAINT OF MARRIAGE—Several interesting points were raised in the construction of a will in a Maryland case.¹ A devise of land was made to the niece of the testator "so long as she may remain single and unmarried, and, in case of her marriage, from and after that time I give and devise all of my said property to my nephew, Turner Asby Maddox, and to his heirs, absolutely forever." The niece conveyed all her right, title and interest in the estate to the appellee and subsequently died unmarried. The appellee claimed the property as his own, asserting a fee-simple title thereto, but complained that he could not sell or fully enjoy the same because the appellant, Turner Asby Maddox, claims that under the will the title to the property is vested in him in fee simple and that the appellee's grantor took only a life estate subject to a conditional limitation in case she married. It was held that there was a life estate in the niece with a limitation over in fee, in case of marriage or death, to the appellant, Turner Asby Maddox.

The questions raised by this case are: (1) Was this a conditional limitation or a condition subsequent? (2) Was the condition in restraint of marriage? (3) Did the niece take the entire estate absolutely and in fee, subject to be divested only if she married, or did she only take a life estate determinable on her marriage? (4) If she took only a life estate, and since the will is silent as to the disposition of the remainder in the event of her dying unmarried, did the testator die intestate as to this remainder or did it vest in Turner Asby Maddox?

A condition subsequent must be carefully distinguished from a limitation, for if a limitation the estate terminates by force of the limitation alone, while in the case of a condition the estate does not terminate upon its breach, unless an entry or claim is made by the person entitled to take advantage of the condition.² Upon the

¹⁸ Pollock on Torts (9th Ed.), Chap. XII, pages 501, 507; *Wilson v. Waddell*, 2 A. C. 95 (Eng. 1876).

¹⁹ Foa, *Landlord & Tenant* (3rd Ed.), p. 134; Cooley, *Torts* (2nd Ed.), p. 570; *Anderson v. Oppenheimer*, *supra*; *Carstairs v. Taylor*, L. R. 6 Exch. 217 (Eng. 1871).

¹ *Maddox v. Yoe*, 88 Atl. Rep. 225 (Md. 1913).

² Co. Litt. 214b; 2 Bl. Comm. 155.

breach of a condition subsequent annexed to a freehold estate, an actual entry, or its equivalent, by the grantor or his heir is generally declared to be necessary in order to revest the estate in the grantor. This was originally based on the theory that the estate having commenced by livery of seisin can be terminated only by an act of equal solemnity.³ "Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim."⁴ A condition subsequent is usually held to be created by such words as "provided," "on condition that," *etc.*, while a limitation is created by the use of the words, "during," "so long as," "while," *etc.* Limitations are of two sorts: special (or determinable) where there is a possibility of reverter in the grantor or his heirs; and conditional, where the limitation is over to a third party, as in shifting uses or executory devises which take effect in derogation of estates previously limited. One important practical difference between a strict common-law condition, with the right of entry in the grantor or his heirs, and a conditional limitation, with the limitation over to a third party, is in the application of the rule against perpetuities.⁵ It has been held that a limitation over to a third person was void as violating the rule, and proceeds with the *dictum*, that if the interest had been in the grantor instead of a third person, then the limitation would have been valid.⁶ This *dictum* has been universally followed in America,⁷ but is repudiated in England, where the right of re-entry and possibility of reverter are held to be within the rule, and hence void, as well as a limitation over to a third person.⁸

In determining whether or not a condition is in restraint of marriage, it again becomes important to distinguish between a mere condition and one with a limitation over to a third party.

³ Litt., §351; Co. Litt. 214b; *Ruch v. Rock Island*, 97 U. S. 693 (1878); *Hubbard v. Hubbard*, 97 Mass. 188 (1867); *Warner v. Bennett*, 31 Conn. 468 (1863); *Adams v. Lindell*, 72 Mo. 198 (1880); *Carter v. Branson*, 79 Ind. 14 (1881); *Power Co. v. Mahan*, 69 Minn. 253 (1897); *Osgood v. Abbott*, 58 Me. 73 (1870).

⁴ Co. Litt. 218a.

⁵ 61 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 686.

⁶ *Brattle Square Church v. Grant*, 69 Mass. 142 (1855).

⁷ *French v. Old South Society*, 106 Mass. 479 (1871); *Cowell v. Springs Co.*, 100 W. S. 55 (1879); *Tobey v. Moore*, 130 Mass. 448 (1881); *Hopkins v. Grimshaw*, 165 W. S. 342 (1896); *Hunt v. Wright*, 47 N. H. 396 (1867); *Penna. Society v. Craig*, 240 Pa. 137 (1913).

⁸ *Ry. Co. v. Gomm*, 20 Ch. D. 562 (Eng. 1881); *Dunn v. Flood*, 25 Ch. D. 629 (Eng. 1883); *In re Hollis Hospital*, 2 Ch. 540 (Eng. 1899); *In re Ashforth*, 1 Ch. 535 (Eng. 1905).

Notwithstanding the many expressions in the books, it is doubtful whether much remains of the once generally accepted rule, that conditions in restraint of marriage in gifts and contracts are void. In the first place, all the exceptions of the Roman law, from which the doctrine was derived were admitted by the ecclesiastical courts; and the courts of common law and of equity have always looked upon the doctrine with disfavor and have been continuously narrowing its application.⁹ The English ecclesiastical courts early adopted, apparently with little regard to difference of circumstances,¹⁰ the rule of the Roman law that, subject to the familiar exceptions, conditions imposing restraint upon marriage were of no effect and would be disregarded. The courts of common law and of equity, however, were restless under the views of the ecclesiastical judges. As the former had jurisdiction of the real estate of decedents, and the latter had to treat in various ways both of the personalty and realty of decedents, the result was that every opportunity was improved of laying down exceptions or qualifications to a doctrine which they were not quite bold enough to repudiate entirely. To this end the intention of the testator or donor came to be looked into more and more, and if possible to be given effect. This alone would seem to have been a virtual abandonment of the Roman rule, which apparently looked to the effect of the gift, regardless of the donor's intention.

The courts of common law and equity began to distinguish between conditions precedent and conditions subsequent, holding that if the condition was precedent, it was binding; though the rule of the ecclesiastical judges was allowed to have greater play if the condition was subsequent. At the same time the question as to whether the donor had made a gift over to a third person on breach of the condition concerning marriage began to be taken into account. It was claimed that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation to which the court was bound to give effect. The adoption of these distinctions was a further indication of the desire of the courts to put the case as far as possible upon the ground of the intention of the testator, *i. e.*, whether he intended to impose a general restraint upon marriage or merely to provide for the donee while unmarried. At last the English judges reached the point of declaring that the real question in a particular case was whether the testator intended to discourage marrying or not.¹¹ Even in view of all the dis-

⁹ *Stackpole v. Beaumont*, 3 Ves. Jr. 89 (Eng. 1796); *Jones v. Jones*, 1 Q. B. D. 279 (Eng. 1876); *Comm. v. Stauffer*, 10 Barr, 350 (Pa. 1849); *Cornell v. Lovett*, 35 Pa. 100 (1860); *Hogan v. Curtin*, 88 N. Y. 162 (1882).

¹⁰ *Stackpole v. Beaumont*, *supra*, n. 9.

¹¹ *Jones v. Jones*, 1 Q. B. D. 279 (Eng. 1876).

tinctions taken, and in the actual conflict of authority, there seems to be little doubt that if the provision as to marriage can be construed as not *designed* (even though tending) to impose restraint upon marrying, it must be sustained. And if the question were open, there might be ground to inquire whether conditions in restraint of marriage generally were contrary to public policy.¹²

The principal case¹³ decides that the niece took only a life estate determinable on her marriage, citing in support of this proposition several writers¹⁴ and a number of cases.¹⁵ In all the cases, save two, an estate was left to a widow *during widowhood*, or words of similar import. In the other two cases,¹⁶ other provisions of the will or other circumstances showed clearly that the estate was to be only an estate for life. It is submitted that *widowhood* can only exist until the death of the widow and that hence when the words *during widowhood* are used clearly, no more than a life estate is created. But that is no precedent for holding that a devise to an *unmarried* woman until she marries or so long as she remains unmarried, would be only a life estate. It is true that the writers have made no distinction between a married woman and an unmarried woman, but on examination it is seen that they all refer to a statement made by Lord Coke¹⁷ that, "If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or to a man until he be promoted to a benefice, in such case the grantee takes an estate for life determinable." Under the common law a devise was *prima facie* a devise for the life of the devisee, unless a contrary intention appeared in the will (by word of inheritance, *etc.*) but this rule has been changed and a devise is now *prima facie* a devise in fee and words of inheritance are not essential. Hence it is submitted that the quotation of Lord Coke is no longer applicable, as words which created an estate in his day are no longer necessary. At common law surely if the word "heirs" was inserted in a grant, such as Coke speaks of (except in the case of the words *dum viduitate*), a determinable fee would be created and not a life

¹² *Comm. v. Stauffer*, 10 Barr, 350 (Pa. 1849); *Jones v. Jones*, 1 Q. B. D. 279 (Eng. 1876); *Allen v. Jackson*, 1 Ch. D. 399 (Eng. 1874).

¹³ *Maddox v. Yoe*, *supra*, n. 1.

¹⁴ 2 Bl. Com. 121; 4 Kent. Com. 26; 1 Washb. Real Prop. (5th Ed.) 63; Cruise Dig. Tit. Est. for Life, c. 1, §8.

¹⁵ *Knight v. Mahoney*, 152 Mass. 523 (1890); *Loring v. Loring*, 100 Mass. 340 (1868); *Dole v. Johnson*, 3 Allen, 364 (Mass. 1862); *Mansfield v. Mansfield*, 75 Me. 509 (1883); *Evan's Appeal*, 51 Conn. 435 (1883); *Cooper v. Poque*, 92 Pa. 254 (1879); *Danna v. Murray*, 122 N. Y. 604 (1890); *Harlow v. Bailey*, 189 Mass. 208 (1905).

¹⁶ *Danna v. Murray*; *Harlow v. Bailey*, *supra*, n. 15.

¹⁷ Co. Litt. 42a.

estate. It is said: "So an estate to A and her heirs, till her marriage, will give a determinable fee. A limitation of this sort differs from a gift to a woman during widowhood."¹⁸ If this is true, and if the word "heirs" is no longer necessary to create a fee, it is difficult to see why the niece did not take a fee. It is submitted that on this phase of the case the decision is doubtful.

Since the will is silent as to the disposition of the remainder in the event of the death of the niece, being unmarried, the question arose as to whether the testator died intestate as to this remainder. The court decided that the testator did not die intestate, but that the remainder vested in Turner Asby Maddox, the one the testator intended to be the ultimate object of his bounty. In this the court followed the settled rule of construction, that the courts will not favor intestacy, particularly in cases such as the one under discussion.¹⁹

C. McA. S.

LEGAL ETHICS—The following questions were recently answered by the New York County Lawyers' Association's Committee on Professional Ethics:

QUESTION:

In an action, which, among other things, involved the validity of a real property corporation mortgage, in which plaintiff had an interest, a motion for a receiver of the property was made by plaintiff, and in opposition the attorney and President of the corporation submitted his affidavit, wherein he stated that he, in behalf of the Company, had offered to pay plaintiff the interest due him on his share of the mortgage, if plaintiff would sign a suitable paper protecting the Company against any loss attending such payment, and that such offer was still open to plaintiff.

Subsequently plaintiff asked said attorney and President to keep his promise and pay the interest, proffering to sign any such reasonable paper as he might exact. Whereupon said attorney and President declined to pay such interest until he could determine whether or not the Company had some counter-claim against plaintiff which could be set up against the interest, and asserted that if he determined there was such counter-claim, then such interest would not be paid.

Was not such refusal to fulfill such offer and promise, improper and unprofessional?

Does not such offer and refusal amount to a deception of the Court?

¹⁸ 1 Preston's Estates, 481.

¹⁹ Metcalf v. Farmingham Parish, 128 Mass. 370 (1880); Chappel v. Avery, 6 Conn. 31 (1826); Manderson v. Lukens, 23 Pa. 31 (1854); Lucksford v. Cheeke, 3 Lev. 125 (Eng. 1684); Eton v. Hewitt, 2 Dr. & Sm. 184 (Eng. 1863); Brown v. Hammond, Johns. V. C. Rep. 210 (Eng. 1858); Underhill v. Roden, 2 Ch. D. 494 (Eng. 1876); Aulick v. Wallace, 75 Ky. 531 (1877); Ferson v. Dodge, 23 Pick. 287 (Mass. 1839); Clark v. Tennison, 33 Md. 85 (1870).